IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S116 of 2011

BETWEEN:

BETFAIR PTY LIMITED
(ACN 110 084 985)

Appellant

AND

RACING NEW SOUTH WALES
(ABN 86 281 604 417)

First Respondent

HARNESS RACING
NEW SOUTH WALES
(ABN 16 962 976 373)

Second Respondent

ATTORNEY-GENERAL
(NEW SOUTH WALES)

Third Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I

1. These submissions are in a form suitable for publication on the Internet.

PART II

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III

3. Not applicable.

PART IV

4. The applicable constitutional, statutory and regulatory provisions are included in the appendix to the submissions of the appellant.

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PART V

Summary

5. The appellant challenges fees imposed under New South Wales legislation on the basis that they are contrary to s 92 of the Constitution (**s 92**).

6. The Attorney-General for Victoria submits:

(a) Section 92 prohibits only protectionist burdens on interstate trade and commerce. It does not prohibit all burdening of interstate trade and commerce. The emergence of the "new economy" has altered the factual circumstances in which s 92 falls to be applied, but has not changed the legal inquiry.

(b) Section 92 is contravened only if the impugned law or administrative measure is properly characterised as protectionist (in the sense identified in paragraph (c) below). Characterisation requires consideration of both the legal operation of a law and its practical effect in order to identify the objective intention of the legislature. The practical effect of an impugned law is relevant only to the extent that it informs the characterisation of that law.

(c) A law is properly characterised as "protectionist" if it imposes a discriminatory burden of a protectionist kind:

(i) A law discriminates against interstate trade or commerce only if it discriminates by reference to State boundaries. Such discrimination may be manifest either:

(1) in the terms of the law, if the law draws a distinction between interstate and intrastate trade and commerce otherwise than by reason of a relevant difference between them (as occurred, for example, in *Bath v Alston Holdings Pty Ltd* ***(Bath v Alston)***[1] and *Fox v Robbins*[2]);

(2) in the terms of the law, if the law treats interstate and intrastate trade and commerce alike notwithstanding a relevant difference between them; or

(3) where the law operates in practice in a way that shows that it was objectively intended to have either of the above effects.

(ii) A law is protectionist only if:

(1) it so discriminates by burdening interstate trade or commerce to its competitive disadvantage or benefitting intrastate trade or commerce to its competitive advantage; and

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[1] (1988) 165 CLR 411.

[2] (1909) 8 CLR 115 at 123.

(2) that burden or benefit is not reasonably necessary to achieve a legitimate non-protectionist purpose.

(d) It is necessary to identify the transactions or conduct to which the invalidating operation of s 92 is said to apply, by virtue of those transactions or that conduct forming part of interstate trade or commerce (or, more accurately, trade, commerce and intercourse among the States). Authorities that pre-date *Cole v Whitfield*[3] suggest that a contract that requires the payment of money in the event of a contingency does not without more constitute a transaction in interstate trade or commerce, even if the parties to that contract are in different States and the payment occurs across State boundaries.[4]

(a) Section 92 of the Constitution prohibits only protectionist burdens on interstate trade and commerce

7. In *Cole v Whitfield*[5] this Court unanimously held that s 92 "precluded the imposition of protectionist burdens"[6] and that s 92 guaranteed to interstate trade and commerce freedom only from burdens of that limited kind.[7] That decision resolved the "quite unacceptable state of affairs"[8] then attending s 92 of the Constitution, as the previous 80 years of decisions concerning that section "ha[d] yielded neither clarity of meaning nor certainty of operation".[9]

8. *Cole v Whitfield* established that for a burden to be protectionist it must discriminate against interstate trade or commerce in a protectionist sense.[10] That requirement was based on an analysis of the history of s 92, which showed that its purpose was the achievement of intercolonial free trade.[11] As was observed by the plurality in *Betfair Pty Ltd v Western Australia* (***Betfair v WA***):[12]

> s 92 was not designed to create "a laissez-faire economy in Australia"; rather, it had a more limited operation, to prevent the use of State boundaries as trade borders or barriers for the protection of intrastate players in a market from competition from interstate players in that market. (emphasis added)

9. While the reasoning in *Cole v Whitfield* has been explained and developed in subsequent cases, no case has doubted its fundamental premise: that s 92 prohibits only discriminatory burdens of a protectionist kind. That premise is likewise not challenged by any party in this appeal.

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3 (1988) 165 CLR 360.

4 *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, discussed in section (d) below.

5 (1988) 165 CLR 360.

6 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

7 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

8 *Cole v Whitfield* (1988) 165 CLR 360 at 385.

9 *Cole v Whitfield* (1988) 165 CLR 360 at 384. See also at 392.

10 *Cole v Whitfield* (1988) 165 CLR 360 at 393, 394, 395, 407.

11 *Cole v Whitfield* (1988) 165 CLR 360 at 392–393.

12 (2008) 234 CLR 418 at 460 [36].

10. That fundamental premise has two important consequences:

(a) First, s 92 is not concerned with the individual rights of entities that engage in interstate trade or commerce.[13] That means that it is not sufficient to establish a contravention of s 92 for an out of State entity to show only that a law of a State burdens trading or commercial transactions in which that entity engages. A burden is not protectionist in the requisite sense merely because it affects competition between participants in a national market, even if those participants happen to be on different sides of a State boundary.[14] That is true even when market participation occurs via the internet.

(b) Secondly, it is impossible to disassociate the operation of s 92, which in its terms refers to trade and commerce "among the States", from the geography of State boundaries, for unless a law or administrative measure discriminates, on its face or in its practical operation, between interstate and intrastate trade or commerce, that law or measure does not contravene s 92.

11. In its terms, and as explained in *Cole v Whitfield*, s 92 directs attention to the distinction between interstate and intrastate trade and commerce (a distinction found also in s 51(i)). *Betfair v WA* did not suggest otherwise. Although the plurality pointed out that "[t]o focus upon the geographic dimension given by State boundaries, when considering competition in a market in internet commerce, presents practical and conceptual difficulties",[15] the plurality did not suggest that those practical and conceptual difficulties could be overcome by focusing only on whether a law or administrative measure has an adverse effect on competition within a national market. A law or measure may have such an adverse effect without involving any discrimination between interstate and intrastate trade and commerce, or any protectionist effect. The ways in which competition can adversely be affected are legion, including price-fixing, false advertising, predatory pricing, exclusive dealing and misuses of market power generally. Section 92 prohibits only that adverse effect which arises as a result of discrimination against interstate trade and commerce.

12. The significance of the developments recognised in *Betfair v WA*, including in particular the rise of the "new economy",[16] is that they have facilitated the ability of interstate traders to compete more readily with local traders, and hence have fostered the development of national markets for goods and services for which there were previously only local markets. Those developments have changed the factual context within which s 92 operates, increasing the occasions upon which interstate traders may seek to rely upon s 92 to impugn State laws, and giving rise to questions it was not previously necessary to examine.[17] However, while the factual context has changed, the legal question posed by s 92 remains unaltered.[18]

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[13] *Betfair v WA* (2008) 234 CLR 418 at 456 [26].

[14] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471, 474.

[15] *Betfair v WA* (2008) 234 CLR 418 at 452 [15].

[16] *Betfair v WA* (2008) 234 CLR 418 at 452 [14].

[17] One such question is how to determine whether a trader is, or is not, located or operating "interstate".

[18] To similar effect see Betfair's submissions, paragraphs 51 to 53.

(b) Characterisation

13. Since *Cole v Whitfield*, it has been recognised that the basic issue raised by s 92 is whether the impugned law or administrative measure can properly be characterised as "protectionist".[19] That was clearly explained in *Castlemaine Tooheys Ltd v South Australia* (***Castlemaine Tooheys***), where five Justices said:[20]

> [W]e are concerned only with the proper characterization of the law as protectionist or not, in the sense described in *Cole v Whitfield*. Hence there is no place for a secondary test to invalidate laws which have been found to lack a protectionist purpose or effect. Rather, the two tests are combined as one inquiry into the characterization of the law as protectionist or otherwise.

14. Their Honours went on to refer to the "considerations which may be relevant in the process of characterization which an Australian court is called upon to undertake".[21] That process can be understood as an inquiry into whether the "true purpose" of the legislation is protectionist.[22] However, the purpose that is sought is the objective intention of the legislature.[23] As Hayne J cautioned in *APLA Ltd v Legal Services Commissioner (NSW)*:[24]

> To attribute "purpose" to a law runs the risk of eliding a useful legal concept expressed in the metaphor of "intention", and the results of some attempted exercise in psychoanalysis of those associated with the making of the law. In the familiar language of the law, there is a risk that an objective concept is turned into a subjective inquiry about the purpose of an individual or the purposes of some group of individuals.

15. Accordingly, while statements of members of the legislature or the executive made before legislation was enacted may in some cases inform the construction of the law, the subjective intentions of members of the legislature and executive are generally not relevant.[25]

16. It is well established that the character of a law is determined by reference to the rights, powers, liabilities, duties and privileges which it creates.[26] The characterisation process requires examination of "the practical as well as the legal operation of the law".[27] Accordingly, the references in the authorities concerning s 92

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[19] *Cole v Whitfield* (1988) 165 CLR 360 at 394.

[20] (1990) 169 CLR 436 at 471. See also at 472; *Cole v Whitfield* (1988) 165 CLR 360 at 408.

[21] (1990) 169 CLR 436 at 471.

[22] *Castlemaine Tooheys* (1990) 169 CLR 436 at 472.

[23] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47]; *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22], 555–556 [82]–[84]; *Stenhouse v Coleman* (1944) 69 CLR 457 at 471.

[24] (2005) 224 CLR 322 at 462 [423]. See also at 394 [178] (Gummow J); *Zheng v Cai* (2009) 239 CLR 446 at [28].

[25] See Full Court at 483 [112] [**AB ?**].

[26] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 352-353, 372.

[27] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Ha v New South Wales* (1997) 189 CLR 465 at 498.

to the practical operation of a law are applications of the general principle that the practical operation of a law is relevant to its characterisation.[28]

17. The fact that the ultimate inquiry posed by s 92 is whether an impugned law can be characterised as protectionist has two important consequences:

(a) First, the practical effect of a law on interstate trade is relevant only to the extent that it bears on the character of the law. A practical effect on one or more interstate traders may or may not be helpful in characterising a law, depending on the factual context in which that law was enacted.

(b) Secondly, because the character of the law cannot change over time, the relevant time for the inquiry as to the practical effect of the law is the time of enactment.[29]

18. Accordingly, the mere fact that a law has the practical effect of burdening an interstate trader is not sufficient to establish a contravention of s 92, because such an effect may say nothing about the character of the law.[30]

19. The "practical effect" or "practical operation" of a law will be relevant to the character of a law where, although the impugned law does not discriminate on its face between interstate and intrastate trade, the operation of the law provides a foundation for an inference that the objective intention of the legislature in enacting that law was to discriminate against interstate trade and commerce.[31] That is, the practical effect of a law is relevant to the extent that it shows that "the true purpose of the law is not to attain that [legitimate] object, but to impose the impermissible burden".[32]

20. The inquiry into the practical effect of an impugned law must consider the effect of the law "in and upon the facts and circumstances to which it relates".[33] That may require the operation of the law to be considered in the context of the commercial, contractual or manufacturing arrangements that existed in the milieu within which the impugned law was intended to operate.[34] It is not to the point that those contractual

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[28] See, e.g., *Cole v Whitfield* (1988) 165 CLR 360 at 399-400.

[29] In that respect, see also Betfair's submissions, paragraph 82.

[30] See, e.g., *Exxon Corp v Governor of Maryland*, 437 US 117 at 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce").

[31] See David Sonter, "Intention or Effect? Commonwealth and State Legislation after *Cole v Whitfield*" (1995) 69 *Australian Law Journal* 332 at 337–341. An expressly prescriptive argument having the same end point is advanced by Amelia Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445 at 462–484. See also Andrew Bell, "Section 92: Factual Discrimination and the High Court' (1991) 20 *Federal Law Review* 240.

[32] *Castlemaine Tooheys* (1990) 169 CLR 436 at 472. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93–94 (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 102–103 (Gaudron J), discussing how the conclusion that a law is not proportionate to an asserted end may support a conclusion that the true legislative purpose of the law was not to achieve that end.

[33] *Ha v New South Wales* (1997) 189 CLR 465 at 498.

[34] To that extent, it was permissible in *Sportsbet* to have regard to the RDA and other contractual arrangements that predated the introduction of the impugned provisions and approvals. Cf Submissions of the Second and Third Respondent in *Sportsbet Pty Ltd v State of New South Wales & Ors* (No 118 of 2011), paragraphs 58 to 60.

arrangements were outside the purview of s 92 because they were not "legislative or executive measures imposed by government".[35] They nevertheless formed part of the context within which the practical operation of the impugned measures must be assessed.

21. To characterise a law as protectionist, it will not be sufficient just to show that its practical operation imposes a burden on an interstate trader. For example, other facts may show that the law adversely affects only a few interstate traders; that it benefits other interstate traders; that it positively affects some interstate and intrastate traders and adversely affects others; that it imposes a heavier burden on local traders than interstate traders; that its effect on interstate trade or commerce is very minor; or that its effect on interstate trade or commerce was unforeseeable or accidental. Any of those matters might, depending on the facts, prevent the impugned law from being characterised as protectionist despite the fact that the law imposes a burden on a particular interstate trader.

22. The practical effect of a law on just one interstate trader may warrant the characterisation of a law as protectionist. If a law that operates by reference to an apparently neutral distinction in practice imposes a significant burden upon a particular interstate trader, in circumstances where that particular trader poses a significant threat to local traders, that may be sufficient to support the conclusion that the law is protectionist (particularly if the relevant market is dominated by a small number of significant participants only one of which is burdened by the practical operation of a law). That is demonstrated by both *Castlemaine Tooheys* and *Betfair v WA*.

23. In *Castlemaine Tooheys*, the Court held that the practical effect of regulations that increased the deposit payable for non-refillable beer bottles was protectionist because the factual background against which the impugned regulations were introduced was that the Bond brewing companies, which used non-refillable bottles, had been substantially increasing their market share in South Australia at the expense of the local brewers, who used refillable bottles (which were subject to a substantially lower deposit). It was conceded that the amount of the refund for non-refillable bottles substantially exceeded the amount necessary to ensure that they were returned at the same rate as refillable bottles.[36] As noted above, five Justices described the inquiry into whether a law was protectionist or not as a process of "characterisation".[37] In identifying the considerations relevant to the characterisation process, their Honours said:[38]

> [T]he fact that a law regulates interstate and intrastate trade even-handedly by imposing a prohibition or requirement which takes effect without regard to considerations of whether the trade affected is interstate or intrastate suggests that the law is not protectionist. Likewise, the fact that a law, whose effects include the burdening of the trade of a particular interstate trader, does not necessarily benefit local traders, as distinct from other interstate traders,

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[35] *Racing NSW v Sportsbet* (2010) 189 FCR 448 at 483 [111].

[36] *Castlemaine Tooheys* (1990) 169 CLR 436 at 462–463.

[37] *Castlemaine Tooheys* (1990) 169 CLR 436 at 471.

[38] (1990) 169 CLR 436 at 471-472 (emphasis added). See also *Cole v Whitfield* (1988) 165 CLR 360 at 408, referring to the "real object" of a law.

> suggests that the purposes of the law are not protectionist ... The fact that a law imposes a burden upon interstate trade and commerce that is not incidental or that is disproportionate to the attainment of the legitimate object of the law may show that the true purpose of the law is not to attain that object but to impose the impermissible burden.

24. The above statement acknowledges that the mere fact that a law imposes a burden on a single interstate trader will not require the characterisation of the law as protectionist, even where the trader is a significant participant in the market. That is further emphasised by their Honours' reasons for rejecting the contention that the law was not protectionist because it advantaged another interstate brewer (CUB):[39]

> [T]he impact of the provision on CUB might tend to suggest that the intended legislative object was not to discriminate against interstate brewers. However, it is not a conclusive consideration. It does not negate the purpose of discriminating against interstate trade consisting, in the main, of the trade of the Bond brewing companies. After all, it was the growing market share of those companies, not CUB, that threatened the market share of the domestic brewers. Discrimination in the relevant sense against interstate trade is inconsistent with s 92, regardless of whether the discrimination is directed at, or sustained by, all, some or only one of the relevant interstate traders.

The last sentence of that passage must be read in context. It does not support the proposition that discrimination against a single interstate trader will always be inconsistent with s 92. It simply recognises that a law may be properly characterised as protectionist even though it is not aimed at all interstate traders.

25. The same point is illustrated by *Betfair v WA*, where this Court held that s 24(1aa) of the *Betting Control Act 1954* (WA) contravened s 92 even though it prevented persons in Western Australia from betting with a betting exchange irrespective of the location of that betting exchange. While the prohibition was facially neutral, its practical effect was, and was objectively intended to be, to "prohibit Betfair, an out-of-State wagering operator" from continuing to compete with Western Australian providers of substitutable products.[40] The practical operation of the law in the factual context in which it was enacted supported the conclusion that the objective intention of the law was to target a particular trader, located interstate, which enjoyed a substantial and increasing presence in the market at the potential expense of a dominant trader located in Western Australia.[41] Accordingly, discrimination against interstate trade and commerce was established.

(c) Discriminatory burdens of a protectionist kind

(i) Discrimination

26. Following *Cole v Whitfield*, a law or administrative measure will contravene s 92 only if it "discriminates against" interstate trading or commercial transactions in goods or

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[39] *Castlemaine Tooheys* (1990) 169 CLR 436 at 475.

[40] *Betfair v WA* (2008) 234 CLR 418 at [122].

[41] *Betfair v WA* (2008) 234 CLR 418 at [67]. As to the presence of Betfair in the market prior to the enactment of the provisions that were challenged, see at [2], [77].

services when compared with intrastate trading or commercial transactions in the same or substitutable goods or services.[42]

27. A law cannot be discriminatory on that ground unless, either in its terms or factual operation, it draws a distinction between intrastate and interstate trade. As Gaudron and McHugh JJ explained in *Castlemaine Tooheys*:[43]

> A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained ... A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation. (emphasis added)

That description of "discrimination" has been adopted and applied by this Court on many occasions and in a variety of contexts.[44] At the heart of the concept is a judgment about the permissibility of a distinction drawn by the impugned law. The first step is therefore to identify the distinction upon which the legal or practical operation of the impugned law depends.

28. The need to identify such a distinction in either the legal or practical operation of the law is apparent from *Cole v Whitfield*, where the Court said:[45]

> In the case of a State law, the resolution of the case must start with consideration of the nature of the law impugned. If it applies to all trade and commerce, interstate and intrastate alike, it is less likely to be protectionist than if there is discrimination appearing on the face of the law. But where the law in effect, if not in form, discriminates in favour of intrastate trade, it will nevertheless offend against s 92 if the discrimination is of a protectionist character.

29. The critical role of discrimination in the analysis required by s 92 is best illustrated by *Barley Marketing Board (NSW) v Norman*.[46] In that case this Court unanimously upheld laws that made the Barley Marketing Board the monopoly seller of barley grown in New South Wales. The object of that law was to improve the financial position of New South Wales barley growers. The Court accepted that the law achieved this objective by protecting small New South Wales producers by giving them the benefit of the marketing board's bargaining power against large purchasers (especially interstate maltsters). Nevertheless, the law was valid because, while it undoubtedly burdened interstate trade (by preventing New South Wales growers from selling barley to Victorian maltsters who wished to purchase that barley), that burden was not discriminatory. The protection of small New South Wales growers was "not

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[42] *Betfair v WA* (2008) 234 CLR 418 at 449 [4], 480 [115], 481 [121]-[122].

[43] (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ). See also *Cole v Whitfield* (1988) 165 CLR 360 at 399 and 408, applied in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 199.

[44] See, eg, *Austin v Commonwealth* (2003) 215 CLR 185 at 247 [118] (Gaudron, Gummow and Hayne JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 (Gummow and Hayne JJ) and 302–303 (Heydon J); *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 424 [89] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[45] (1988) 165 CLR 360 at 408.

[46] (1990) 171 CLR 182.

accompanied by an element of discrimination against the interstate trade in barley or interstate traders in that commodity."[47] Absent such discrimination, it was not to the point that Victorian maltsters may now pay more than they did when purchasing from border growers in New South Wales, because they were treated equally with maltsters in New South Wales.[48] The New South Wales maltster was "given no competitive advantage over his Victorian counterpart", so the Act did "not result in 'a departure from equality of treatment' of interstate and intrastate trade and commerce, that being the object of the constitutional injunction in s 92".[49]

30. *Barley Marketing Board* makes it clear that the relevant comparison is between the treatment of interstate and intrastate trade or commerce after the impugned law has commenced. It is not between the treatment of interstate trade or commerce before and after the enactment of the impugned law.[50] The fact that intrastate traders are worse off after the enactment of the impugned law than they were before is not of itself sufficient to establish any contravention of s 92, as is demonstrated by the fact that it was not to the point that Victorian maltsters were no longer able to obtain low prices from New South Wales border growers. Section 92 was not contravened because the Victorians maltsters were treated equally with maltsters in New South Wales: all had to buy New South Wales barley from the marketing board.

31. The discrimination with which s 92 is concerned is discrimination against interstate trade. The inquiry is not whether an individual trader's particular circumstances are such that that trader is more adversely affected by a law than some or all intrastate traders.[51] It is whether the impugned law imposes a greater burden on persons who are from time to time on the supply or demand side of interstate trade or commerce when compared to persons who are participating in the market for goods or services of the same kind but who are engaged in intrastate trade or commerce.[52] A law that does not, in its legal or practical operation, distinguish between traders on the basis of whether or not they engage in interstate trade or commerce cannot "discriminate against" interstate trade or commerce.[53] So, the Full Court stated that:[54]

> The inquiry is whether the individual trader, as a participant in interstate trade, is subject to a differential burden by reason of the operation of the law or measure in the common circumstances of the trade. The differential burden must be imposed by the law or executive measure in the common circumstances of the milieu in which the trade occurs. (emphasis added)

32. Approached in that light, a facially neutral measure that distinguishes in its practical operation between high and low margin operators would not discriminate against interstate trade or commerce unless the factual context is such that it could be shown

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47 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 202.

48 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 202.

49 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 203.

50 Cf Sportsbet's submissions, paragraph 42.

51 Full Court at 388 [104] [**AB ?**]. Accordingly, establishing that the law imposes a more onerous burden on Betfair than Tab Ltd is insufficient; cf Betfair's submissions, paragraph 60.

52 *Betfair v WA* (2008) 234 CLR 418 at 453 [18], 480 [115].

53 See the Full Court's reasoning at 388 [103]. [**AB ?**]

54 Full Court's reasoning at 388 [104] [**AB?**].

that discrimination against low margin operators was a proxy for discrimination against interstate operators.

33. Even if a law does draw a distinction between transactions in interstate trade and commerce and those in intrastate trade or commerce, that law will not discriminate against interstate trade if the distinction is appropriate to some difference between interstate and intrastate trade and commerce. Questions of degree are involved in forming a view as to the relevance, appropriateness, or permissibility of a distinction. As Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said in *Bayside City Council v Telstra Corporation Ltd*:[55]

> Discrimination ... involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.

34. Accordingly, before it is possible to determine that an impugned law discriminates against interstate trade or commerce, it is necessary to consider whether any apparently different treatment is negated or explained by some relevant difference between interstate and intrastate trade and commerce.

35. Betfair contends that this appeal involves discrimination despite the uniform nature of the fee to which it was subjected, because it contends that that fee involves "the equal treatment of those who are not equals".[56] Betfair seeks to have its wagering product treated as a product of the "same kind" as that provided by other wagering service providers, but then to have the "money flow" that results from the purchase of that product treated as being of a different kind to the turnover of other wagering service providers. That submission should be rejected for the reasons advanced by the first and second respondents. It should also be rejected because, were that submission to be accepted, governments would be unable to impose uniform fees or charges without the risk of those charges being held to be discriminatory because they were not tailored to the various business models of those required to pay the fees or charges.

(ii) Protectionism

36. Even if a law discriminates against interstate trade and commerce in some respect, it will contravene s 92 only if it is properly characterised as "protectionist". A law will be protectionist only if it:

(a) so discriminates with the result that it operates to the competitive disadvantage of interstate trade or commerce or to the competitive advantage of intrastate trade or commerce; and

(b) is not reasonably necessary to achieve a legitimate purpose.

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[55] (2004) 216 CLR 595 at 629–630.

[56] Betfair submissions, paragraph 63.

These can be seen as positive and negative criteria.

Positive criterion – Competitive disadvantage

37. An inquiry into whether an impugned law or administrative measure imposes a burden on interstate trade forms a necessary part of the process of characterising a law or measure as "protectionist" because, unless the law or measure imposes a burden of sufficient magnitude to affect competition in the relevant market, the law or measure will be incapable of protecting the intrastate participants in that market.

38. Accordingly, before a law or administrative measure can be protectionist it must "burden" interstate trade. That means that it must operate to reduce the ease with which interstate trade can take place or the likelihood that it will take place.[57] If a burden is placed on interstate trade in a way that discriminates against interstate trade, that will have the effect of making it more difficult for interstate trade to take place than intrastate trade of the same kind. That will put interstate trade at a competitive disadvantage.

39. Consistently with the above, in *Castlemaine Tooheys* five Justices observed:[58]

> *Cole v Whitfield* establishes that a law which imposes a burden on interstate trade and commerce but does not give the domestic product or the intrastate trade in that product a competitive or market advantage over the imported product or the interstate trade in that product, is not a law which discriminates against interstate trade and commerce on protectionist grounds. The present case stands on a different footing because the facts recited in the special case show that the Bond brewing companies were disadvantaged in the two respects already mentioned which gave the South Australian brewers a competitive or market advantage. (emphasis added)

40. In the same case, Gaudron and McHugh JJ likewise considered a law to be "protectionist" if it conferred a "significant competitive advantage" on local traders in the relevant market.[59] Similarly, the unanimous Court in *Barley Marketing Board v Norman* referred to the fact that New South Wales maltsters were "given no competitive advantage" over their Victorian counterparts.[60] Finally, in *Betfair v WA* the plurality referred to the fact that the impugned provisions would "operate to the competitive disadvantage of Betfair and to the advantage of ... in-State wagering operators" in concluding that those provisions were properly characterised as "protectionist".[61]

41. The authorities do not speak with one voice as to the extent of the burden on interstate trade (or the extent of any effect on competitive advantage or disadvantage) that must

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[57] Such a burden can take the form of a benefit given to intrastate trade but denied to interstate trade, the burden being the denial of the benefit.

[58] *Castlemaine Tooheys* (1990) 169 CLR 436 at 467 and 477 (referring to the Bond companies as being subjected "to serious competitive disadvantages").

[59] *Castlemaine Tooheys* (1990) 169 CLR 436 at 478. Having noted that advantage, their Honours said "the regime is therefore protectionist".

[60] (1990) 171 CLR 182 at 203.

[61] *Betfair v WA* (2008) 234 CLR 418 at 481 [118]. See also 481-482 [121]-[122].

be shown before s 92 will be engaged, although they show that the burden must be of real substance. Thus:

(a) In *Fox v Robbins*, Isaacs J said that "if any of the provisions discriminate adversely to other States it does impair that freedom, because it deters the residents of the State from selling or consuming, and therefore from purchasing or importing, the products of the other States".[62]

(b) In *Cole v Whitfield*, the Court recognised that interstate trade and commerce was not "rendered immune from any regulation which did not affect like intrastate trade", including because "[s]uch regulation might not constitute a burden at all".[63] That suggests that only burdens of some significance will be capable of being characterised as "protectionist". Consistently with that view, the Court expressed its conclusions in terms of whether the substantial effect of the impugned regulation was "to impose a burden which so disadvantages interstate trade in crayfish as to raise a protective barrier around Tasmanian trade in crayfish. The latter questions are questions of fact and degree on which minds might legitimately differ."[64]

(c) In *Bath v Alston*, the majority described a law as protectionist if it was "likely to" benefit intrastate traders.[65]

(d) In *Betfair v WA*, the plurality observed that "[t]he term 'protection' is concerned with the preclusion of competition".[66] Heydon J arguably set the bar lower, referring to one of the impugned provisions as having a "tendency to exclude persons in the position of the first plaintiff, namely would-be entrants from outside Western Australia into the trade of supplying wagering services to gamblers, from that trade".[67]

42. The Full Court below held that "Whether a protectionist character can be discerned as a matter of practical effect depends on the effect of the law on the competitive relationship between interstate and intrastate trade".[68] The Court framed the issue as "whether the imposition of the fee is apt adversely to affect competition in the market in Australia for the provision of wagering services".[69] It considered it fatal to Betfair's argument that it had not demonstrated:[70]

> by evidence that any disturbance of the competitive relativities would be significant in terms of market share or profitability. That is, we think, a fatal deficit in Betfair's attempt to show that the apparently neutral fee is apt to

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[62] (1909) 8 CLR 115 at 129.

[63] (1988) 165 CLR 360 at 399.

[64] (1988) 165 CLR 360 at 409 (emphasis added). That passage was applied by the Full Court at 384-385 [89]-[90], [92] **[AB ?].**

[65] *Bath v Alston* (1988) 165 CLR 411 at 426.

[66] (2008) 234 CLR 418 at 452 [15].

[67] (2008) 234 CLR 418 at 488 [146].

[68] At 376-377 [65] **[AB ?]**

[69] At 382 [82]. **[AB ?]**

[70] At 387 [99]. **[AB ?]**

> have the practical effect of denying or diminishing the competitive advantage which it enjoys by reason of its low margin business model.

43. That passage recognises that, in a case that depends on establishing that a facially neutral measure imposes a discriminatory burden on interstate trade or commerce, the existence of a burden on interstate trade or commerce, and the practical effect of that burden, must be clearly demonstrated before any inference could be drawn that would permit the impugned measure to be characterised as protectionist. As the Full Court went on to observe:[71]

> All that Betfair has shown in this case is that by maintaining current pricing structures, and given its low margin, the fee takes a higher proportion of Betfair's turnover as compared to that of the TAB. It is not an effect which is apt to characterise the measure as protectionist. This will be the case with any low margin operation, whatever its State of origin.

Negative criterion – Reasonable necessity

44. Even if a law discriminates against interstate trade or commerce to its competitive disadvantage, there is a negative criterion that must be satisfied before a law can properly be characterised as protectionist.

45. A law cannot be characterised as protectionist if it is enacted in pursuit of a legitimate (i.e. non-protectionist) objective and if the law is reasonably necessary to achieve that objective. Thus, in *Cole v Whitfield* the Court said:[72]

> A law which has as its real object the prescription of a standard for a product or a service or a norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by s 92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s 92.

46. The Court went on to conclude that, even if the regulations whose validity was in issue in that case gave a "competitive or market advantage" to Tasmanian crayfish over imported crayfish, "the agreed facts make it clear that the extension of the prohibition against sale and possession of imported crayfish is a necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters".[73] The conclusion that the impugned laws were a necessary means of achieving a legitimate objective had the result that the impugned regulations could not properly be characterised as protectionist whether or not they gave a competitive or market advantage to intrastate trade.

47. It was on the basis of the above reasoning that the Court in *Castlemaine Tooheys* held that a burden that is "appropriate and adapted" to a non-protectionist purpose does not infringe s 92.[74]

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[71] At 388 [103]. [**AB ?**]

[72] (1988) 165 CLR 360 at 408.

[73] (1988) 165 CLR 360 at 409.

[74] (1990) 169 CLR 436 at 472–474.

48. That criterion was further refined in *Betfair v WA*, where it was explained as involving an inquiry as to whether a burden is "reasonably necessary" to achieve a legitimate (i.e. non-protectionist) purpose.[75] If a law is reasonably necessary for a non-protectionist purpose, it cannot properly be characterised as "protectionist", irrespective of its effect on the competitive position of interstate trade and commerce.

49. The criterion of "reasonable necessity" involves consideration of whether the burden is greater than that which the reasonable attainment of the purpose requires. It requires there to be an "acceptable explanation or justification" for the differential treatment of interstate trade or commerce.[76] It is not, however, necessary that a burden on interstate trade or commerce be absolutely necessary to achieve the non-protectionist object.[77]

50. The above reasoning is consistent with this Court's acceptance in the context of constitutional restrictions other than s 92 that, if a law is properly characterised as being appropriate and adapted to a permissible objective, it does not infringe the constitutional restriction.[78]

Application to this case

51. In light of the above, the following questions should be asked in order to determine whether the impugned fee conditions can properly be characterised as protectionist:

(a) Do the conditions in their terms or practical operation discriminate against interstate trade or commerce, meaning either that:

(i) the conditions in their terms draw a distinction between interstate and intrastate trade and commerce otherwise than by reason to a relevant difference between them;

(ii) the conditions in their terms treat interstate and intrastate trade and commerce alike notwithstanding a relevant difference between them; or

(iii) the practical operation of the conditions shows that the objective intention of the control bodies was to achieve either of the above effects?

(b) If so, do the conditions burden interstate trade or commerce to its competitive disadvantage or benefit intrastate trade or commerce or its competitive advantage?

(c) If so, is that burden or benefit none the less reasonably necessary to achieve a legitimate non-protectionist purpose?

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[75] *Betfair v WA* (2008) 234 CLR 418 at 477 [102].

[76] *Betfair v WA* (2008) 234 CLR 418 at 478 [105]; *Castlemaine Tooheys* (1990) 169 CLR 436 at 477.

[77] *Thomas v Mowbray* (2007) 233 CLR 307 at 332 [22]–[23], cited in *Betfair v WA* (2008) 234 CLR 418 at 477 [102].

[78] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93–94; *Kruger v Commonwealth* (1997) 190 CLR 1 at 102–103.

52. Only when the first two questions are answered "yes" and the third question is answered "no" could the conditions properly be characterised as protectionist, and therefore in contravention of s 92 of the Constitution.

(d) Transactions in interstate trade or commerce

53. Section 92 presupposes for its application to an impugned law (or administrative measure) the identification of the interstate trade or commerce said to be unlawfully affected. The above submissions, and those of the appellant, assume the identification of such interstate trade or commerce in the present case. However, it is not clear that the assumption is well-founded.

54. Section 92 of the Constitution refers to "trade and commerce ... among the States". The same words are used in s 51(i) of the Constitution. Those words have the same meaning in both sections.[79] They have been held to require a distinction to be drawn between trade and commerce among the States and trade and commerce within a State. This Court has long acknowledged that that distinction "may seem artificial in modern times".[80] Nevertheless, it has held that it is a distinction compelled by the Constitution, that being the view that caused the Court decisively to reject the United States "commingling doctrine".[81] As Gibbs J said in *Attorney-General (WA) v Australian National Airlines Commission*:[82]

> The dichotomy between interstate and intrastate trade suggested by s 51(i) must be maintained however much interdependence may now exist between those two divisions of trade and however artificial the distinction may be thought to be.

55. In *Betfair v WA*, the plurality emphasised that it was "an error to read what was decided in *Cole v Whitfield* as a complete break with all that had been said in this Court respecting the place of s 92 in the scheme of the Constitution".[83] As set out below, *Betfair v WA* did not expressly overrule certain prior decisions relating to the identification of interstate trade and commerce, which on their face have potential relevance to this case.

56. In earlier times a transaction involving the sale of goods between a supplier in one State and consumer in another could readily be seen as interstate trade or commerce. Usually, but not always, the "interstate" character of the trade or commerce appeared from the movement of goods or the carrying on of activities across State borders. A contract that expressly or by necessary implication required goods to be sent interstate was part of interstate commerce.[84] However, the fact that goods, money or credit were sent interstate to satisfy a contractual obligation did not render the contract (as

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[79] *W & A McArthur Ltd v Queensland* (1928) 28 CLR 530 at 549; Zines, *The High Court and the Constitution* (5th ed, 2008) 84.

[80] *Wragg v New South Wales* (1953) 88 CLR 353 at 385-386 (Dixon CJ).

[81] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 628-629, 672, 677. That doctrine was derived from *Shreveport* (1914) 234 US 342.

[82] (1976) 138 CLR 492 at 502.

[83] (2008) 234 CLR 418 at 451 [11].

[84] See, eg, *W & A McArthur Ltd v Queensland* (1928) 28 CLR 530 at 567–568, quoted in *Cole v Whitfield* (1988) 165 CLR 360 at 395–396. See also *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 627ff, 650–651, 664–668.

distinct from the actual movement of goods) part of interstate trade.[85] That was illustrated, for example, by the fact that the petroleum exchange system challenged in *HC Sleigh Ltd v South Australia*[86] was held not to involve interstate trade or commerce because, while it plainly involved interstate transactions, it did not require the transportation of petroleum across State borders.

57. According to the existing authorities, it is not necessarily sufficient to attract the operation of s 92 that Betfair conducts its business from Tasmania with persons who are present in other States, because as Brennan J said in *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board*, "[t]he subject of immunity is trade, not persons".[87] The phrase "trade and commerce among the States" encompasses only trade or commerce of a specific kind.[88] Brennan J explained in *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board*:[89]

> Where a legislative or executive measure operates to burden a particular transaction, an examination of the validity of the measure calls first for an examination of the character of the transaction: is it part of interstate trade, commerce or intercourse? Interstate trading transactions ... are the subject of immunity, not antecedent or subsequent transactions except where the burden imposed on an antecedent or subsequent transaction invalidly burdens the interstate transaction.

58. In cases involving goods, the presence of the buyer and seller in different States at the time of the transaction will often give the transaction the character of an interstate transaction. But difficulties arise where a trader has a presence in more than one State, or where the transaction involves the provision of a service in cases where the service itself (as opposed to the service provider) cannot readily be said to cross State lines.

59. In *Hospital Provident Fund Pty Ltd v Victoria* (***Hospital Provident Fund***),[90] the Hospital Provident Fund (a company incorporated in Victoria) was found not to engage in interstate trade despite the fact that it: had offices in different States; made contracts with contributors involving the company in a liability to pay claims at any address in Australia and to pay fees to hospitals in any part of Australia (including payments made from Victoria to contributors in different States); and required its directors, servants and agents to travel between States for the purposes of the company's business.[91] Dixon CJ (with whom Kitto J agreed) explained, in comments that are equally apt to the appellant's business:[92]

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[85] Zines, *The High Court and the Constitution* (5th ed, 2008) 86.

[86] (1977) 136 CLR 475 at 506–507.

[87] (1985) 157 CLR 605 at 649. See also the Full Court's judgment below at 385 [95]. [**AB ?**]

[88] See, eg, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 672 (Dixon J); *Wragg v New South Wales* (1953) 88 CLR 353 at 385–386 (Dixon CJ); *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 78, 113–115, 144, 149; Zines, *The High Court and the Constitution* (5th ed, 2008) 98.

[89] (1985) 157 CLR 605 at 649, citing *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 71-72,79; *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 187.

[90] (1953) 87 CLR 1.

[91] See *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1 at 11 and 35 for the relevant facts.

[92] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1 at 14; to similar effect see at 24 (McTiernan J), 38–39 (Fullagar J) and 45 (Taylor J). See also *W&A McArthur Ltd v Queensland* (1920) 28 CLR 530 at 540, 559–560; *HC Sleigh v South Australia* (1977) 136 CLR 475 at 508 (citing many cases that, in the context of

> The essence of the business from the point of view of the person engaged in it is the making of contracts involving on the one hand the receipt of money and on the other hand the payment of money on the occurrence of certain contingencies. From the point of view of the statute no doubt it is the character of the contingencies that forms the distinguishing and important feature of the business. But neither the character of the contingencies nor the character of the monetary side of the contract could bring the transaction within the conception of inter-State trade commerce or intercourse. For a company to contract with a man that, in consideration of the latter making payments to it at any given place, the company will in a specified contingency make a payment to him at some other place is not to engage in inter-State commerce. Neither the making of the contract nor the performance of the contract by either side involves any step or dealing which of itself forms part of inter-State commerce even if a State line runs between the two places. If it is found necessary or convenient by either party to communicate with the other across a boundary between two States in the course of making a contract, that is an accidental feature which cannot make it an inter-State contract, although the sending of the communication itself will, of course, form an act of inter-State commerce or intercourse. (emphases added)

The second half of the above passage was quoted and approved by Mason J (with whom Barwick CJ and Stephen J relevantly agreed) in *HC Sleigh Ltd v South Australia*.[93] The reasoning in that passage has direct relevance to the business of wagering service providers participating in the national market for wagering, for if the reasoning in the above passage is correct it establishes that the wagering transactions that take place in that national market do not involve "interstate trade and commerce", even though the communications between those participants in the course of those transactions do involve interstate intercourse.

60. In *Hospital Provident Fund*, Dixon CJ did not consider that the "internal affairs" of the company, by which his Honour meant the "communications between its offices in different States, the transmission of funds and the movement of its directors servants and agents" had any effect on the conclusion that the Hospital Provident Fund was not engaged in interstate trade or commerce.[94] That is particularly significant having regard to the recognition in *Betfair v WA* of the emergence of an internet-based economy, for the courts should be astute to prevent transactions from being converted into interstate transactions via the expedient of routing those transactions through an interstate server. That could readily become a device for avoiding the operation of State (or Commonwealth) regulation.

61. While other aspects of the reasoning in *Hospital Provident Fund* reflected the criterion of operation doctrine which was rejected in *Cole v Whitfield*, the reasoning quoted above in relation to the meaning of intrastate trade and commerce has never

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trade involving the making of contracts, confine the concept of interstate trade to those contracts that require products to be delivered across State boundaries). See also Zines, *The High Court and the Constitution* (5th ed, 2008) 160.

[93] (1977) 136 CLR 475 at 506–507. See also to broadly similar effect, but not mentioning *Hospital Provident Fund*, 494–495 (Gibbs J). While the reasoning of *HC Sleigh* in relation to s 90 was overturned in *Ha v New South Wales* (1997) 189 CLR 465, there was no criticism of the above passage.

[94] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1 at 15.

been disapproved. It was not overruled by *Cole v Whitfield*. To the contrary, it was cited with approval by Dawson J (a member of the Court that decided *Cole v Whitfield*) in *Street v Queensland Bar Association*.[95]

62. In *Street*, decided after *Cole v Whitfield*, Dawson J was the only member of the Court who considered the s 92 issue. His Honour said:

> Even if I am wrong in what I have said and it is correct to regard a barrister as being engaged in trade or commerce, I should nevertheless not regard him as being engaged in trade or commerce of an interstate character. To plead a cause in court is to do something which is essentially local. It is not something which it is possible to do across State boundaries. Even if the location in which a case is being argued changes from one State to another, as can now occur quite commonly, the change does not convert the pleading or hearing of the case into traffic of an interstate kind. Nor is advice given by a barrister an interstate dealing even if the advice is given to a person in another State. The giving of advice may involve an interstate communication, which may itself form part of interstate commerce, but that is all. The position is no different if the barrister receives his fee from an interstate source. To adapt the words of Dixon CJ in *Hospital Provident Fund Pty Ltd v State of Victoria*, neither the retainer of a barrister nor the performance of his duties contemplates or of its nature involves the movement from one place to another of things tangible or intangible, and certainly not from a place in one State to a place in another. (emphasis added)

63. Difficulties arise in determining whether internet businesses involve interstate or intrastate trade or commerce. As the plurality said in *Betfair v WA*,[96] after quoting a passage from *Cole v Whitfield* which referred to protection of "domestic industry":

> The references in this passage to "domestic industry" highlight the practical and conceptual perplexity that arises in accommodating internet commerce to the notion of protectionism in intrastate [sic] trade and commerce.

64. The plurality suggested a solution to the perplexity in the next sentence, stating that:

> [R]eferences in *Castlemaine Tooheys* to "the people of" the State and to "its" well-being, rather than to those persons who from time to time are placed on the supply side or the demand side of commerce and who are present in a given State at any particular time, have their own difficulties. They appear to discount the significance of movement of persons across Australia, and of instantaneous commercial communication, and to look back to a time of physically distinct communities located within colonial borders and separated by the tyranny of distance. (emphasis added)

The emphasised words focus not on whether the participants in a particular transaction are local or interstate traders, but rather on whether a particular transaction is to be regarded as part of interstate trade or commerce because of the presence of the participants in different States at the time of the transaction.[97]

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[95] (1989) 168 CLR 461 at 540.

[96] *Betfair v WA* (2008) 234 CLR 418 at [18].

[97] See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [165], [398]–[408], [422].

65. At all events, the question what constitutes the relevant interstate trade and commerce was not argued or directly considered in *Betfair v WA*. The parties have not raised this issue in this proceeding and in those circumstances the Attorney-General for Victoria does not seek to have it decided. It is noted, however, that the State of Victoria has raised the issue in a proceeding in the Federal Court of Australia in which judgment is currently reserved.[98]

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[98] Proceeding VID 808 of 2010,